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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 291

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff-Respondent,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Petitioner,

and ESSEX WIRE CORP.,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS TO GRANT THE WRIT	7
A. Conflict in the Circuits	7
B. Novelty and Importance of the Decisions Below	10
The Statute	11
The Decisions Below	12
C. Constitutional Implications and Policy Considerations	16
D. Conflicting Judicial Policies in Private Antitrust Enforcement	17
Conclusion	19

APPENDIX

COURT OF APPEALS JUDGMENT	A1
COURT OF APPEALS OPINION	A2

TABLE OF CITATIONS

CASES:

Brown Shoe Co. v. *U. S.*, 370 U. S. 294 (1962) ... 15
Brunswick-Balke-Collender Co. v. *American Bowling & Billiard Corp.*, 150 F. 2d 69 (2d Cir., 1945), rev'd. on rehearing 150 F. 2d 74 ... 12

Farmington Dowel Products Co. v. *Forster Mfg. Co.*, 223 F. Supp. 967 (D. C. Me., 1963) ... 8
FTC v. *Bunte Bros.*, 312 U. S. 349 (1941) ... 11
FTC v. *Cement Institute*, 333 U. S. 683 (1948) ... 7, 9, 16
FTC v. *Nash-Finch Co.*, 288 F. 2d 407 (D. C. Cir., 1961) ... 9

Gottesman v. *General Motors Corp.*, 221 F. Supp. 488 (S. D. N. Y., 1963) ... 14

Henderson v. *U. S.*, 339 U. S. 816 (1950) ... 9, 10
Highland Supply Co. v. *Reynolds Metals Co.*, 327 221 F. Supp. 15 (E. D. Mo., 1963) ... 8
Highland Supply Co. v. *Reynolds Metals Co.*, 327 F. 2d 725 (8th Cir., 1964) ... 9

International Shoe Machine Corp. v. *United Shoe Machinery Corp.*, 315 F. 2d 449 (1st Cir., 1963) cert. den. 375 U. S. 820 (1963) ... 15
International Tag & Salesbook Co. v. *American Salesbook Co.*, 6 F. R. D. 45 (S. D. N. Y., 1943) .. 12

Land v. *Dollar*, 330 U. S. 731 (1947) ... 20

Marquette Cement Mfg. Co. v. *FTC*, 147 F. 2d 589 (7th Cir., 1945) ... 9
Momand v. *Universal Film Exchange*, 43 F. Supp. 996 (D. Mass., 1942) affirmed 172 F. 2d 37 (1st Cir., 1948) ... 15, 18

PAGE

New Jersey Wood Finishing Co. v. *Minnesota Mining & Manufacturing Co.*, 216 F. Supp. 507 (D. C. N. J., 1963) 1, 2

New Jersey Wood Finishing Co. v. *Minnesota Mining & Manufacturing Co.*, — F. 2d — (3rd Cir., 1964) 1, 2

Proper v. *John Bene & Sons*, 295 Fed. 729 (E. D. N. Y., 1923) 9, 12

Southwestern Sugar & Molasses Co., Inc. v. *River Terminal Corp.*, 360 U. S. 411 (1959) 20

Standard Oil Co. v. *FTC*, 340 U. S. 231 (1951) 10

Steiner v. *20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir., 1956) 6

Sun Theatre Corp. v. *RKO Radio Pictures*, 213 F. 2d 284 (7th Cir., 1954) 18

Times-Picayune Publishing Co. v. *U. S.*, 345 U. S. 594 (1953) 15

Twin Ports Oil Co. v. *Pure Oil Co.*, 26 F. Supp. 366 (D. C. Minn., 1939) 19

United Banana Co. v. *United Fruit Co.*, 172 F. Supp. 580 (D. Conn., 1959) 15

U. S. v. *Aluminum Co. of America*, 1 F. R. D. 48 (S. D. N. Y., 1938) 9

U. S. v. *Aluminum Co. of America*, — U. S. —, 12 L. Ed. 2d 314 (1964) 15

U. S. v. *Charles Pfizer & Co.*, 205 F. Supp. 94 (S. D. N. Y., 1962) 10

U. S. v. *General Electric Co.*, 15 F. 2d 715 (N. D. Ohio, 1925); aff'd. 272 U. S. 476 (1926) 10

U. S. v. *General Motors Corp.*, 323 U. S. 373 (1945) .. 20

U. S. v. *Interstate Commerce Commission*, 337 U. S. 426 (1949) 10

U. S. v. *Philadelphia National Bank*, 374 U. S. 321 (1963) 15

PAGE

U. S. v. *United Shoe Machinery Corp.*, 89 F. Supp. 349 (D. C. Mass., 1950) 12

U. S. Alkali Export Ass'n v. *U. S.*, 325 U. S. 196 (1945) 7

Volasco Products Co. v. *Fry Roofing Co.*, 223 F. Supp. 712 (E. D. Tenn., 1963) 8

ADMINISTRATIVE PROCEEDINGS:

Federal Trade Commission, *In the Matter of Minnesota Mining and Manufacturing Company, a Corporation*, Docket No. 7973 7

CONSTITUTION:

United States Constitution, Fifth Amendment .. 3

STATUTES:

Clayton Act, Sec. 4B, 15 U. S. C. § 15b 1, 2, 3, 6

Clayton Act, Sec. 5(a) and (b), 15 U. S. C. § 16(a) and (b), *passim*, See pp. 3-5

Clayton Act, Sec. 7, 15 U. S. C. § 18 ..... 2, 6

Clayton Act, Sec. 11(a) 15 U. S. C. § 21(a) 10

Clayton Act, Sec. 11(e) 15 U. S. C. § 21(e) 10

Clayton Act, Sec. 11(g) 15 U. S. C. § 21(g) 5

Judicial Code, 28 U. S. C. § 1254 (1) 2

Judicial Code, 28 U. S. C. § 1292(b) 2, 8

Sherman Act, Sec. 1, 15 U. S. C. § 1 ..... 3, 6

Sherman Act, Sec. 2, 15 U. S. C. § 2 ..... 3, 6

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 12(b) F. R. C. P. 6

Rule 56(b) F. R. C. P. 6

ADMINISTRATIVE RULES:

FTC Rules of Practice, 16 C. F. R. § 1.134 18

PAGE

CONGRESSIONAL MATERIAL:

Sen. Rep. 83, 86th Cong. 1st Sess. (1959) 13

OTHER AUTHORITIES:

Commerce Clearing House *Trade Regulation Reporter*, § 9157 12

Kronstein & Miller *Regulation of Trade, a Case and Textbook*, p. 1106 (1953) 12

Toulmin, *Anti-Trust Laws*, Vol. 2, p. 118 (1949) . 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in *New Jersey Wood Finishing Company* v. *Minnesota Mining & Manufacturing Company and Essex Wire Corp.*, No. 14,487, entered May 20, 1964.

Opinions Below

On April 19, 1963, the United States District Court for the District of New Jersey (Augelli, D. J.) denied the motion of defendant Minnesota Mining & Manufacturing Company (hereinafter "3M") to dismiss the complaint in this private antitrust action as barred by the statute of limitations provided in Section 4B of the Clayton Act as

amended, 15 U. S. C. § 15b. Judge Augelli's opinion (reported at 216 F. Supp. 507) and the order entered thereon were printed in the Appendix to Defendant-Appellant's Brief in the Court of Appeals (cited as "CA App"; 58a-67a). On May 20, 1964, the United States Court of Appeals for the Third Circuit affirmed the District Court in an opinion ~~not yet generally reported (but see CCH Trade Reg. Rep't'r, Current Cases at ¶71,110)~~ which appears in the Appendix hereto, pp. A2-A26 AND IS REPORTED AT 332 F2d 346.

Jurisdiction

The Court of Appeals obtained jurisdiction by virtue of 28 U. S. C. § 1292(b) following appropriate certification by the District Court (CA App., 67a) and its own grant of a petition for review.

The judgment of the Court of Appeals was entered May 20, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Is a Federal Trade Commission proceeding a "civil or criminal proceeding . . . instituted by the United States" within the meaning of Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b)?

2. Is an FTC order to cease and desist the full legal equivalent of "a final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States" within the meaning of Section 5(a) of the Clayton Act, 15 U. S. C. § 16(a)?

3. Does an FTC complaint which alleges that a series of vertical and horizontal acquisitions in the years 1952 to 1956 may substantially lessen competition in violation of Section 7 of the Clayton Act, but alleges no violation of the Sherman Act, sufficiently "complain of" Sherman

Act matters to suspend the statute of limitations otherwise applicable to a private treble damage claim that the final acquisition in August of 1956 was alone the product of a conspiracy and an attempt to monopolize forbidden by Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2?

Both courts below specifically answered each of these questions—there squarely raised—in the affirmative. Each question now rises in this Court as one of the first impression although each has been answered in the negative in other circuit and district courts.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

The statutory provisions involved are Sections 4B and 5 of the Clayton Act. Section 4B, 69 Stat. 283, 15 U. S. C. § 15b reads, in relevant part, as follows:

> "Any action to enforce any cause of action under sections 4 or 4A of this title shall be forever barred unless commenced within four years after the cause of action accrued."

Section 5 of the Clayton Act, 69 Stat. 283, 15 U. S. C. § 16, in its present form (and as amended in 1955 to take account of the enactment of Section 4B), reads as follows:

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Sec-

tion 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 4A.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws but not including an action under Section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under Section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Section 5, from its original enactment (38 Stat. 731) and until 1955, read as follows:

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: . . .

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private

> right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Thus, on the face of the statute, it is clear that the amendments to Section 5 in 1955—the first and, to date, only occasion on which Congress has actually amended this section—accomplished the following:

1. Provided—as the amendment's only substantive change—that tolling the period of limitations with respect to private claims would extend not only during pendency of proceedings by the United States but also for one year following termination of such proceedings;

2. Placed the *prima facie* evidence and tolling provisions into separately lettered subparagraphs; and

3. Replaced the phrases "criminal prosecution" and "suit or proceeding in equity" as they appeared in both paragraphs of Section 5 with the phrase "any civil or criminal proceeding."

Finally—and only because of the decision of the Court of Appeals below and without conceding the provision to be in any way applicable—we quote Section 11(g) of the Clayton Act after its enactment in 1959, 73 Stat. 243, 15 U. S. C. § 21(g);

> "(g) Any order issued under subsection (b) of this section shall become final—
>
> (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time. . . ."

Statement of the Case

On November 20, 1961, New Jersey Wood Finishing Company, a manufacturer of electrical insulation materials and plaintiff below (hereinafter "New Jersey Wood"), filed its original complaint seeking treble damages and other

relief for alleged violations of both Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Section 7 of the amended Clayton Act, 15 U. S. C. § 18. New Jersey Wood claims that 3M's acquisition from defendant Essex Wire Corp. of the principal assets of Insulation and Wires, Inc. (hereinafter "IWI") in August, 1956, deprived New Jersey Wood of an important outlet for its products in favor of 3M's competitive products thereby restraining trade in violation of the particular antitrust statutes cited.

While New Jersey Wood amended its complaint (CA App 48a-55a)* to allege certain other acts and effects claimed to have damaged its business, it is conceded that 3M's acquisition of IWI is central to plaintiff's case. That acquisition, therefore, fixed "the time the blow which caused the damage was struck". *Cf. Steiner* v. *20th Century-Fox Film Corp.*, 232 F. 2d 190, 194-5 (9th Cir., 1956).

Inasmuch as the action was commenced more than four years after 3M's acquisition of IWI's assets, answering the complaint was deferred by stipulation and 3M moved pursuant to Rule 12(b)(6) and, alternatively, Rule 56(b) of the Federal Rules of Civil Procedure, to dismiss the complaint and/or for summary judgment thereon (plus certain other relief not presently pertinent) on the ground that the action was barred (CA App. 10a-13a).

On April 19, 1963, Judge Augelli rendered his opinion and entered the order of which review is sought denying 3M's motion on the grounds that the applicable statute of limitations had been tolled by virtue of Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b), with respect to all alleged violations of both the Clayton and the Sherman Acts because

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* During the pendency of the motion in the District Court, New Jersey Wood filed an amended complaint pursuant to direction by the Court (CA App 56a-57a). While both the original complaint (CA App 5a-9a) and the amended complaint were included in the record the controlling legal questions are common to both pleadings. Judge Augelli treated with the amended complaint throughout, as did the Court of Appeals.

of the pendency of an FTC proceeding against 3M which terminated in a consent order in August, 1961.

The proceeding in question (FTC Docket No. 7973) proceeded upon a complaint issued June 24, 1960 (CA App. 15a-26a) which charged, *inter alia*, that 3M's acquisition of IWI from Essex Wire in August, 1956, among other acquisitions, had violated Section 7 of the Clayton Act. Inasmuch as the FTC has no jurisdiction over Sherman Act violations as such (*FTC* v. *Cement Institute*, 333 U. S. 683, 690-2 [1948]; *U. S. Alkali Export Ass'n* v. *U. S.*, 325 U. S. 196, 208 [1945]), its complaint—unlike that at bar—made no reference to, or any charge respecting, the Sherman Act. The consent order of August 24, 1961 terminating that proceeding (CA App. 47a) and entered before any testimony had been taken—see 15 U. S. C. §16(a)—likewise made no reference to conduct which could be deemed violative of the Sherman Act.

Judge Augelli's order (CA App. 67a) recited that, under 28 U. S. C. 1292(b), a controlling question of law was involved, as to which there was substantial ground for a difference of opinion, and that an immediate appeal might materially advance the ultimate termination of the litigation. The Court of Appeals for the Third Circuit granted 3M's petition for an interlocutory appeal and, on May 20, 1964, affirmed the District Court in all respects.

REASONS TO GRANT THE WRIT

A. Conflict in the Circuits

The ruling of the District Court, which now carries the authority of one Court of Appeals, not only involved controlling questions of law going to the heart of this particular action, but also a number of novel concepts and determinations never before arising in the half-century of private enforcement of rights created by the Clayton Act. Until Judge Augelli's decision, no court had ever held that

pendency of an FTC proceeding, much less one terminating in a consent order, could serve to toll the applicable statute of limitations, (since 1955, Section 4B).

Since Judge Augelli's opinion was filed, private plaintiffs in suits pending in three other districts have sought to secure for themselves the benefits of tolling during the pendency of FTC proceedings. Without exception, the other courts to which such contentions have been urged have expressly rejected Judge Augelli's rationale, held that FTC proceedings are not within the scope of Section 5 of the Clayton Act and denied the relief sought.

Chief Judge Taylor of the Eastern District of Tennessee first considered Judge Augelli's determination and, in *Volasco Products Co. v. Fry Roofing Co.*, 223 F. Supp. 712 (E. D. Tenn., 1963), rejected that ruling as "doubtful authority" (p. 713). Next, Judge Meredith in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 221 F. Supp. 15, 17 (E. D. Mo., 1963) noted that, although the FTC shares jurisdiction with the Justice Department to enforce certain sections of the Act, this could not alter the fact that Congress "by its language" had provided for a tolling of limitations only for judicial proceedings. Finally, in *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 223 F. Supp. 967 (D. C. Me., 1963), Judge Gignoux concluded after a thorough review of the legislative history and previous judicial interpretations of Section 5 that FTC proceedings had never been and were not within its purview.*

During pendency of the appeal in the case at bar, the Eighth Circuit accepted an interlocutory appeal in the *Highland Supply* case and, while reversing the District Court's rulings on other grounds, expressly affirmed Judge Meredith's holding that an FTC proceeding could not toll the statute of limitations in a unanimous opinion by Circuit

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* The First Circuit denied plaintiff's application under § 1292 (b), 28 U. S. C., to appeal Judge Gignoux's decision in an order dated December 10, 1963 (Case #6244).

Judge Ridge. To the Eighth Circuit, the language of Section 5 so clearly excluded FTC proceedings that resort to legislative history for guidance was unnecessary. *Highland Supply Co.* v. *Reynolds Metals Company*, 327 F. 2d 725, 730 (8th Cir., 1964). Here, again, Judge Augelli's views were characterized as "of doubtful authority".

By affirming Judge Augelli, however, the Third Circuit has now created a flat conflict in the decisions in this important area (which its opinion frankly acknowledges) and has declared that pendency of an FTC proceeding does toll the statute of limitations. In fact, the Third Circuit has gone further and has declared for the first time that FTC orders may constitute *prima facie* evidence against a defendant in a subsequent private suit, thereby—for Section 5 purposes—making FTC cease and desist orders equivalent to the "judgments and decrees" of courts.

Furthermore, in ruling that, when the FTC proceeds to enforce the Clayton Act, "such action must be regarded as one on behalf of the United States", the Circuit Court's decision below conflicts directly with prior cases which, in one context or another, have held the FTC and the United States to be separate legal entities. *FTC* v. *Nash-Finch Co.*, 288 F. 2d 407, 410 (D. C. Cir., 1961); *U. S.* v. *Aluminum Company of America*, 1 F. R. D. 48 (S. D. N. Y., 1938); *Proper* v. *John Bene & Sons*, 295 Fed. 729, 732 (E. D. N. Y., 1923). Although similar issues do arise in Clayton Act cases, additional doubt as to the Third Circuit's view stems from the very real difference in the functions performed by these two enforcement arms. *Marquette Cement Mfg. Co.* v. *FTC*, 147 F. 2d 589, 593-4 (7th Cir., 1945) final disposition reversed on other grounds, *sub nom. FTC* v. *Cement Institute, supra.*

Certainly the rationale adopted below is at variance with the many citable instances in which this Court has reviewed separate—and, on occasion, opposing—positions of the United States, on the one hand, and one of our regulatory agencies on the other. See, *e.g.*, *Henderson* v.

U. S., 339 U. S. 816 (1950); *U. S.* v. *Interstate Commerce Commission*, 337 U. S. 426 (1949); *cf. Standard Oil Co.* v. *FTC*, 340 U. S. 231 (1951).

It is also relatively clear that this duality in legal personality is at least sufficient to deny the actions of the FTC the effect of an estoppel vis-a-vis the United States. See, *e.g.*, *U. S.* v. *Charles Pfizer & Co.*, 205 F. Supp. 94, 97 (S. D. N. Y., 1962); *U. S.* v. *General Electric Co.*, 15 F. 2d 715 (N. D. Ohio, 1925), aff'd. 272 U. S. 476 (1926); *cf.* Clayton Act, Sec. 11(c), 15 U. S. C. § 21(c).

Thus the Third Circuit, in flatly holding that an administrative hearing initiated by the Trade Commission is the full legal equivalent of a "civil or criminal proceeding . . . instituted by the United States," has traversed any number of prior rulings in this Court and elsewhere which have heretofore denied that the FTC and the United States are one and the same entity. Clearly whether these distinctions are to be maintained or discouraged is of fundamental importance to a reasoned understanding of Section 5 of the Clayton Act.

B. Novelty and Importance of the Decisions Below

Is the Clayton Act's four-year statute of limitations on private treble damage suits tolled during pendency of an FTC proceeding? In other words, is an FTC proceeding a "civil or criminal proceeding" instituted "by the United States"? This, however, is only part of a broader question as to whether proceedings under the Clayton Act before administrative agencies* were intended by Congress to have the extraordinary effects which Section 5 of the Act, as originally adopted in 1914, accorded to "suits" and "proceedings in equity" by "the United States."

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* Section 11(a), 15 U. S. C. § 21(a), grants jurisdiction to enforce certain of the Act's provisions to several administrative agencies, including—in addition to the FTC—the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Reserve Board.

The Third Circuit has now answered these questions affirmatively and has also held—again for the first time—that an order emanating from the Commission in a Clayton Act proceeding can constitute *prima facie* evidence in a subsequent treble damage action. The Eighth Circuit and three other District Courts have held to the contrary in equally emphatic terms. The resulting uncertainty calls for resolution of this Court, and the answers are to be found in judicial and Congressional interpretations of Section 5 and considerations of policy that should govern administrative enforcement of the Act.

The Statute:

Fifty years of enforcement of the Clayton Act had yielded no authority—until the decisions below—holding either that (a) the findings of administrative bodies in proceedings under the Clayton Act could qualify under Section 5(a) as *prima facie* evidence in subsequent private actions or that (b) proceedings by such bodies could toll the statute of limitations as provided by Section 5(b). Significantly, not only had there been no decided case precisely on the tolling point, it does not appear that any previous private plaintiff had so much as even contended that administrative proceedings were within the scope of the tolling provision. *Cf. FTC* v. *Bunte Bros.*, 312 U. S. 349, 352 (1941).

The *prima facie* evidence provision, on the other hand, had received considerable attention. However, both Congressional expositions and judicial decisions construing Section 5 establish that Congress, in 1914, did not make administrative determinations in Clayton Act proceedings admissible as *prima facie* evidence. Such a conclusion was virtually compelled by the language of Section 5 which, from 1914 until its amendment in 1955, described the document to which it accorded the status of *prima facie* evidence as "a final judgment or decree" rendered in a "criminal prosecution" or a "suit or proceeding in equity" brought by or on behalf of "the United States". As early

as 1923, the Court in *Proper* v. *John Bene & Sons,* 295 Fed. 729 (E. D. N. Y., 1923), held this language was judicial in context and applied to judgments which resulted from actions in court by the Attorney General but not to orders issued by the FTC.

In 1955, well after the Federal Rules of Civil Procedure had abolished the concept of a proceeding in equity, Section 5 was amended and the phrase "civil or criminal proceeding" was substituted for the phrase "criminal prosecution" or "suit or proceeding in equity". No court, however, including the Third Circuit has considered that this language change was intended to bring administrative proceedings within the purview the section as substantive law. The other requirements specified in 1914 were left unchanged in 1955 and 1955 is the only time that Section 5 of the Clayton Act has been amended since its original enactment. Although the changes made then had been under consideration in Congress for several years, there had been not the slightest suggestion that Congress intended the eventual amendment to alter this interpretation despite numerous express references to the fact that Section 5 had been widely assumed to exclude FTC orders. See, *e.g., U. S.* v. *United Shoe Machinery Corp.,* 89 F. Supp. 349, 356 (D. C. Mass, 1950; Wyzanski, J.); *International Tag & Salesbook Co.* v. *American Salesbook Co.,* 6 F. R. D. 45, 48 (S. D. N. Y., 1943); *Proper* v. *John Bene & Sons, supra;* 2 Toulmin's *Anti-Trust Laws* p. 118 (1949); Kronstein & Miller, *Regulation of Trade, a Case and Textbook,* p. 1106 (1953); 2 CCH Trade Reg. Rep'r., § 9157; see also dissent by Judge Evans from original decision in *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiard Corp.,* 150 F. 2d 69, 73 (2d Cir., 1945), rev'd. on rehearing 150 F. 2d 74.

The Decisions Below:

The Third Circuit actually has now confirmed 3M's position that neither the *prima facie* evidence nor the tolling provision of Section 5 applied to administrative proceed-

ings when Section 5 was originally enacted or when it was amended in 1955. Such a determination acknowledges that during most of the years the Clayton Act has been enforced the rights of private plaintiffs did differ depending on whether the Justice Department or the FTC undertook enforcement. Thus the Court of Appeals deliberately cast away the principal reason offered to support the District Court decision, namely, that it did not "seem logical" that Congress would intend to have a plaintiff's rights turn on whether a prior enforcement proceeding had been undertaken by court or agency.

Nevertheless, the Third Circuit held that FTC orders and FTC proceedings presently enjoy all the efficacy of court proceedings for purposes of Section 5 and frankly rested the entire weight of this decision on the 1959 amendment to Section 11 which made FTC orders final and enforceable upon expiration of the time to appeal. As in 1955, the reports that preceded the Finality Act of 1959, 73 Stat. 243, give no hint of any Congressional purpose to bring administrative proceedings and administrative orders within the scope of Section 5.* Thus, in 1959 Congress amended Section 11 of the Act, 15 U. S. C. § 21, and gave no indication whatsoever that it had intended to consider—much less enlarge—Section 5. However, the Third Circuit would work this momentous, substantive change in the scope of Section 5 on the mere implication that, in making administrative Clayton Act orders final, Congress somehow intended, *sub silentio,* to make Section 5 applicable to them.

Still another point involving the determination of the extent of tolling, if any, requires this Court's construction of Section 5(b)'s provision that any suspension of limitations extends only to claims "based in whole or in part on any matter complained of" in the government proceeding.

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* Sen. Rep. 83, 86th Cong. 1st Sess., U. S. Code Cong. & Admin. News, 1959, Vol. 2, 1804 *et seq.*

The courts below, we submit, virtually read this limitation out of Section 5 altogether. While the problem thus presented is obviously one of transcendent importance, its resolution for this particular case is fundamental to the future course of the litigation. Plaintiff rests solely upon only one aspect of the charge made by the FTC in Docket 7973—that 3M's ultimate acquisition of IWI, following seven prior acquisitions in the electrical insulation field, might tend to lessen competition in violation of Section 7. By now alleging that that single acquisition, in fact, resulted from an actual conspiracy to restrain trade between 3M and its co-defendant Essex Wire Corp. and actually tended to create a monopoly in violation of Sections 1 and 2 of the Sherman Act to this plaintiff's particular damage as a competing manufacturer of electrical insulation, the complaint here charges misconduct different from, and in addition to, the earlier charge made by the FTC. It may well be that these additional charges will be the ones plaintiff must prove in order to recover because there is nowhere a citable instance of a treble damage recovery predicated upon Section 7 of the Clayton Act as against District Court authority that Section 7 affords no such recovery. See *Gottesman* v. *General Motors Corp.*, 221 F. Supp. 488, 493 (S. D. N. Y., 1963), pet. for cert. pending, Dkt 1152 (filed May 27, 1964). Thus, if this view of the law is upheld by this Court, plaintiff will eventually forego Section 7 altogether and stand solely on its Sherman Act allegations. This being so, it is appropriate to ask now—and directly—whether conduct prohibited by the Sherman Act was a "matter complained of" by the FTC in Docket 7973.

The Third Circuit found it unnecessary to cite any authority to support the ruling announced in the last brief paragraph of its opinion that plaintiff's conspiracy and attempted monopolization allegations are timely, even though not charged by the FTC, since they arise from the same acquisition that was the subject of the FTC complaint. Unlike either of the other determinations which the lower

courts were required to make, however, there was on this point considerable previous authority, all contrary to the rule the District Court and the Third Circuit have announced. In addition to *Gottesman, supra,* (which involved the same contention made here as to the same statutory sections), Judge Wyzanski, for instance, had already held that a suit by the United States charging a Section 7 violation did not toll the statute of limitations for a private plaintiff relying on Sherman Act allegations. *Momand* v. *Universal Film Exchange,* 43 F. Supp. 996, 1012 (D. Mass., 1942), final determination affirmed 172 F. 2d 37 (1st Cir., 1948).

In any event it is manifest that "not every violation of § 7 . . . would necessarily be a violation of the Sherman Act." *U. S.* v. *Philadelphia National Bank,* 374 U. S. 321, 355 (1963); *Times-Picayune Publishing Co.* v. *U. S.,* 345 U. S. 594, 609-610 (1953). See *U. S.* v. *Aluminum Co. of America,*—U.S.—, 12 L. Ed. 2d 314, 319 (1964) citing *Brown Shoe Co.* v. *U. S.,* 370 U. S. 294, 323 (1962); *Int'l Shoe Machine Corp.* v. *United Shoe Machinery Corp.,* 315 F. 2d 449 (1st Cir., 1963) cert. den. 375 U. S. 820 (1963); *United Banana Co.* v. *United Fruit Co.,* 172 F. Supp. 580 (D. Conn., 1959).

It could hardly be more clear that (a) a multilateral conspiracy (b) resulting in an ascertainable present restraint of trade or a monopoly (c) to the personal damage (d) of a competitor (e) in the period after 1956 presents different legal issues turning upon different factual considerations than in the case of a series of acquisitions in the period 1952 to 1956 where the effect may be "substantially to lessen competition, or to tend to create a monopoly". As this Court has pointed out, the whole thrust of Congressional concern in amending Section 7 in 1950 was the impact of mergers on *competition,* rather than on *competitors. Brown Shoe Co.* v. *U. S., supra,* at pp. 320, 344.

Thus, quite irrespective of the novel and unique extension of Section 5 by the lower courts to embrace regulatory

agency proceedings, it appears that a patent limitation on the scope of Section 5(b) has been obscured—if, indeed, not eliminated—in defiance of considered authority to the contrary.

It is to review these novel and important concepts in the context in which first expounded that we request certiorari.

C. Constitutional Implications

Not only do the opinions below lack any affirmative support in statutory history or previous interpretation but, in addition, the Third Circuit opinion fails to deal adequately with distinctions—having Constitutional import—that have come to be recognized between judicial and administrative proceedings. Such distinctions and the policies which support them provide another impelling reason for this Court to consider this appeal.

For many years, our law has recognized that administrative agencies perform functions which are only partly judicial in nature and that procedures considered necessary to a judicial determination could and should be relaxed for administrative determinations insofar as allowed by enabling statutes and Constitutional concepts of due process. The justification for administrative procedures which, among other non-judicial elements, admit hearsay evidence was offered by this Court in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705-6 (1948):

> "Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. . . . And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress."

The Third Circuit's opinion is obviously inconsistent with this rationale. Using a Commission order as *prima facie* evidence or, for that matter, tolling the statute of limitations during a Commission proceeding surely punishes defendants for past conduct found unlawful only by the Commission operating under administrative procedures and standards of evidence and heavily occupied with considerations of national economic policy rather than adjudicating issues between parties litigant. Certainly, the answer given to this contention is unsatisfactory. The Court declared that a defendant against whom an administrative order was introduced as *prima facie* evidence could attack the *weight* of that evidence although not its *propriety*.

This answer, however, not only fails to take account both of the practical possibilities open to a defendant faced with such an order and also the possible applicability of the legal rules barring collateral attack on the basis of a judgment but clearly pose fundamental questions of procedural due process. Can the determinations of regulatory agencies—and we do not perceive that the scope of the ruling below is limited to FTC determinations—be converted wholesale into "evidence" in consonance with the Constitution when those determinations are readily formulated out of testimony inadmissible in a court of law? If the Third Circuit is correct, what has become of a treble-damage defendant's right to have material factual issues tried to a jury? Surely questions of such import merit the immediate attention of this Court.

D. Conflicting Judicial Policies in Private Antitrust Enforcement

This case also involves the relationship between the two paragraphs—since 1955, the two subsections—which together constitute Section 5 of the Clayton Act. We have argued that the two subsections are related and dependent and that the purpose of the tolling provision was only to preserve the usefulness of a judgment or decree obtained in a government suit, if one eventuated, since, as the Seventh

Circuit has put it, a plaintiff "can derive no benefit from the pendency of the government's suit until a final decree has been entered therein." *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 290 (7th Cir., 1954); *Momand* v. *Universal Film Exchange*, 43 F, Supp. 996, 1012 (D. Mass., 1942).

Judge Augelli, on the other hand, assumed that Congress, by adopting Section 5(b), intended to grant to potential private plaintiffs the "advantage of facts uncovered" in governmental proceedings regardless of the outcome of the proceedings in which gathered. In this instance, the Court obviously overlooked the fact that antitrust enforcement arms do not, as a matter of course, make their investigative files available to potential private plaintiffs. Note, FTC Rules of Practice, 16 C. F. R. § 1.134.

Actually, there is no indication anywhere in the legislative history that Congress intended any more than what it granted in Section 5(a), namely, that private plaintiffs were to be accorded the use of judgments or decrees in litigated government cases as *prima facie* evidence in their own subsequent actions; nor has any previously decided case supported any notion that Section 5(b) includes a broader, independent Congressional purpose of encouraging private plaintiffs to await the outcome of a government proceeding to see if the government is able to uncover information "helpful" to later, private litigants.

Thus, as with the determinations as to whether an FTC proceeding is a "civil . . . proceeding . . . by the United States" or an FTC cease and desist order is "a final judgment or decree," the courts below have been faced with a novel question, *i.e.*, whether the tolling provision is broader than the *prima facie* evidence provision and independent of it. This question likewise requires determination by this Court because its resolution below is in conflict with previous interpretations and because there are policy considerations which indicate that private plaintiffs should be limited to the benefit that Congress expressly provided.

We know that from the beginning—that is, since 1914—Congress has intended to facilitate private actions in order to supplement enforcement of the antitrust laws. To encourage private suits, Congress not only provided for treble damage recoveries, but accorded private plaintiffs the benefit of government decrees as prima facie evidence. Nevertheless, there is room to argue that Congress did not view private suits as its primary policy but preferred, rather, when the two policies conflicted, to simplify government litigation by encouraging defendants to enter into consent decrees that would thereupon be unavailable to private plaintiffs. See *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 376 (D. C. Minn., 1939). If the statute of limitations is now to be tolled during the pendency of government "investigations" regardless of the outcome thereof, and if private plaintiffs are to be supplied with evidence from government investigations, private plaintiffs can be expected to await the result of government action, and the usefulness of private actions as an independent means of enforcement of the act will thus be diminished. Of course, it is also true that such a rule would forfeit a major present inducement to defendants in government cases to accept consent decrees.

Again, it is appropriate that such paradoxes in antitrust enforcement policies be referred to this Court.

Conclusion

Finally, it seems to us that this Court should hear this appeal in the interest of efficient administration of justice. Judge Augelli's original determination on our motion prompted the same argument to be made on behalf of other plaintiffs and has already required decisions by three other district courts and the Eighth Circuit. Since these other decisions are all contrary to the District and Circuit Court decisions in this case, the issues presented will continue to arise until this Court determines once and for all the rela-

tionship of administrative proceedings and administrative orders to Section 5 of the Clayton Act. It is for this reason that we apply for certiorari—to determine the issue in the case in which it first arose—and ask this Court to overcome its traditional reluctance to grant certiorari before a final disposition of the litigation. *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminal Corp.*, 360 U. S. 411, 415-6 (1959). Cf. *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 374, 377 (1945); *Land* v. *Dollar*, 330 U. S. 731, 734 n2 (1947).

Thus, in view of the novelty and importance of the rulings below, of the immediate rejection of those rulings by the first three District Courts to face identical questions after Judge Augelli and of the resulting conflict with the decision of the Eighth Circuit in *Highland Supply, supra*, we submit that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Judgment of the Court of Appeals Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,

and

ESSEX WIRE CORPORATION,
MINNESOTA MINING AND
MANUFACTURING COMPANY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge,* and MCLAUGHLIN and HASTIE, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order filed April 19, 1963, entered April 22, 1963, of the said District Court be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

May 20, 1964

Opinion of the Court of Appeals Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,487

NEW JERSEY WOOD FINISHING COMPANY,
Plaintiff-Appellee,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant-Appellant,

and ESSEX WIRE CORP.
Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 10, 1963

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 20, 1964)

By MCLAUGHLIN, *Circuit Judge.*

This is an interlocutory appeal under 28 U. S. C. Section 1292(b) from a denial of a defense motion to dismiss based on the statute of limitations.

Plaintiff-appellee is the New Jersey Wood Finishing Company (N. J. Wood), a New Jersey corporation engaged in the manufacture of certain electrical insulation products. Defendant-appellant is the Minnesota Mining and Manufacturing Company (3M), a Delaware Corpora-

tion, doing business in New Jersey and likewise engaged in the electrical insulation field.

On June 24, 1960, the Federal Trade Commission (FTC) had issued a complaint against 3M, charging that 3M "has violated and is now violating the provisions of Section 7 of the Clayton Act (U. S. C. Title 15, Section 18) as amended, * * *." That FTC complaint substantially alleged the following:

For a number of years prior to 1953, 3M was a highly diversified company, manufacturing and selling a number of product lines and segments thereof. From 1952 to 1956 3M began to acquire the operations of a number of manufacturers and various product groups, particularly in the electrical insulation field. During this period it also bought several distributor companies. In March 1956, 3M absorbed Prehler Companies, the second largest distributor (15% of sales) of electrical insulation products in the United States, and in August 1956, it absorbed Insulation and Wires, Inc. (IWI), the third largest such distributor (14% of sales). After obtaining these corporations, 3M became the largest such distributor, having around 29% of the total sales of electrical insulation products sold and distributed by electrical instrument distributors in the United States.

By these acquisitions, 3M further became the second largest distributor of seven (7) of the electrical insulation products it manufactured and had 18% of the total sales of these products. In 1958 3M's sales of these products through its acquired distributors, increased to about 21% of the total sales of said products, while the sale of those seven products by the largest electrical insulation distributor decreased to less than 21%.

By virtue of 3M's acquisition of these distributor corporations, other manufacturers who had previously dealt with Prehler and IWI found this market closed to them. Similarly other distributors, who had been supplied with products by 3M and the other manufacturers 3M acquired, found this source of supply cut off.

Opinion of the Court of Appeals Below

The FTC complaint asserted that the effect of the acquisitions of Prehler and IWI, and of each of them, by 3M may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution, and sale of electrical insulation products, individually and collectively in various sections of the country within the meaning of Section 7 of the Clayton Act as amended. The complaint thereafter specified these injurious effects.[1]

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[1] The aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. Minnesota Mining, as the largest producer of electrical insulation tape, and with its acquisitions of leading manufacturers of other electrical insulation products, by acquiring two of the three largest distributors of electrical insulation products in the United States, has extended and integrated its business in such a manner as to substantially increase its position in the manufacture, sale and distribution of electrical insulation products; and it may exercise the inherent powers of its acquired position to substantially lessen competition or tend to create a monopoly in the manufacture, sale and distribution of electrical insulation products.

2. Manufacturers of electrical insulation products have been foreclosed from a substantial share of the market for said products.

3. Competition has been eliminated between Prehler and IWI in the distribution and sale of electrical insulation products in the sections of the country in which they were competing, and potential competition has been eliminated between said companies throughout the United States.

4. Actual and potential competition has been eliminated between Minnesota Mining and the two acquired distributors.

5. As a leading manufacturer and distributor of electrical insulation products Minnesota Mining has acquired a position whereby it may:

(a) Manipulate prices or use other means to lessen competition or tend to create a monopoly; and

(b) Concentrate the full impact of its sales, promotional and merchandising experience and ability on one of its electrical insulation products, or on one selected section of the country.

6. Concentration of the manufacture, sale and distribution of electrical insulation products may be increased.

Opinion of the Court of Appeals Below

The FTC complaint concluded by charging that:

> "The foregoing acquisitions, acts and practices of respondent, * * * constitute a violation of Section 7 of the Clayton Act as amended and approved December 29, 1950:
>
> "WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of June, A. D. 1960 issues its complaint against said respondent."

Apparently before any testimony was taken, this FTC proceeding was terminated by consent order entered July 20, 1961, under which 3M was ordered inter alia to divest itself absolutely of all the assets of Insulation and Wires Division (IWI) of the Essex Wire Corporation and its related corporations.

On November 20, 1961, N. J. Wood filed its complaint in this action alleging that 3M had violated Section 1 and Section 2 of the Sherman Act (15 U. S. C. Section 1, 2 (1958)) and Section of the Clayton Act (15 U. S. C. 18 (1958)) to its (N. J. Wood's) injury, for which under Section 4 of the Clayton Act (15 U. S. C. 15 (1958)) it was entitled to treble damages. N. J. Wood claimed that 3M had acquired IWI in violation of these antitrust statutes and deprived it of a substantial national market for its products.

3M moved to strike N. J. Wood's complaint because the cause of action accrued more than four years before the commencement of the suit and was therefore barred by the statute of limitations. N. J. Wood opposed the motion, arguing that the statute was tolled under 5(b) of the Clayton Act by virtue of the FTC proceeding against 3M.

On March 19, 1963, an amended complaint was filed by direction of the court. Its gravemen is the same as are the controlling legal questions.

On the motion, the trial judge held that the proceeding by the FTC to enforce Section 7 of the Clayton Act

was a "civil or criminal proceeding * * * instituted by the United States" within the meaning of Section 5 of the Clayton Act (15 U. S. C. 16 (1958));[2] that the statute of limitations was therefore tolled and plaintiff's filing of the complaint in this cause against 3M was timely. New Jersey Wood Finishing Company *v.* Minnesota Mining & Manufacturing Company, 216 F. Supp. 507 (D. C. N. J. 1963).

N. J. Wood's claim arises in the first instance under Section 4 of the Clayton Act, which provides that "persons" injured by violations "of the antitrust laws" shall be entitled to threefold damages. 15 U. S. C. 15 (1958) "Anti-

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[2] The first paragraph of Section 5 (now 5(a) (15 U. S. C. 16 (a)) provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 4A."

The second paragraph of Section 5 (now 5(b)) (15 U. S. C. 16(b)) provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, * * * the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

trust laws" as that term is employed in Section 4 has a restricted meaning. Notwithstanding other antitrust acts prior or subsequent to the Clayton Act, private parties can recover under Section 4, only where their injury has resulted from acts in violation of the specific antitrust laws, itemized in Section 1 of the Act.[3] 15 U. S. C. 12 (1958); Nashville Milk Co. *v.* Carnation Co., 355 U. S. 373 (1958). The Sherman and Clayton Acts upon violations of which N. J. Wood's complaint is based, are "antitrust laws" within the meaning of Section 4. Other acts are not, including for our purposes, the Federal Trade Commission Act. See Samson Crane Co. *v.* Union National Sales, 87 F. Supp. 218 (D. C. Mass. 1949).

In its scheme for the enforcement of these "antitrust laws", Congress envisaged both public and private actions. United States *v.* Borden Co., 347 U. S. 514, 519 (1954); United States *v.* Cooper Corp., 312 U. S. 600, 608, 610 (1941); United States *v.* Bendix Home Appliances, 10 F. R. D. 73, 77 (S. D. N. Y. 1949); see 2 Toulmin's Antitrust Laws, Section 16.6 P. 91 (1949); MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bulletin, P. 113, et seq. (1962). Through Section 4, the business public became an ally of government and the private antitrust suit, a substantial weapon of national antitrust policy. Cinnamon *v.* Abner A. Wolf, Inc., 215 F. Supp. 833, 834 (E. D. Mich. 1963), citing Report of the Attorney General's National Committee to Study the Antitrust Laws, P. 378 (1955). Congress had hoped that these

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[3] These "antitrust laws" are: The Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209); The Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730); and the Wilson Tariff Act (Act of August 27, 1894, c. 349, Section 73-77, 28 Stat. 57 as amended Act of February 12, 1913, c. 40, 37 Stat. 667).

private antitrust suits would supplement government actions and perhaps in some cases make them unnecessary.[4]

This broad plan of private and public actions is further detailed. The Sherman Act[5] contemplates civil (Sec-

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[4] "At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money.

"The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act * * *.

"Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful Government action, so that the judgments and decrees in the Federal proceedings could be used to establish a case. Amassing evidence (sic) for antitrust cases would otherwise be a prohibitively expensive task for most plaintiffs." S. Rep. No. 619, 84 Cong., 1st Sess. June 21, 1955; U. S. Code Cong. & Ad. News, 2329 (1955).

[5] The Sherman Act was the first piece of Federal Antitrust legislation. Passed in 1890, the act sought to protect commerce against unlawful restraints and monopolies, and preserve freedom of competition. Act of July 2, 1890, c. 647, 26 Stat. 209. Standard Oil *v.* United States, 221 U. S. 1, 50, 52 (1911). The era in which it was enacted was one "of trusts" and "combinations of business and capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." Apex Hosiery Co. *v.* Leader, 310 U. S. 469, 491-493 (1940). The Sherman Act was not only an immediate legislative answer to this threat, but a declaration of policy as well. It was basically a criminal statute, but Section 4 of that act also provided for enforcement by civil actions by the Justice Department through the various United States Attorneys. Section 7 also gave a private right of action for treble damages. This latter section was for practical purposes absorbed in Section 4 of the Clayton Act of 1914, but its repeal was not pronounced until 1955. Act of July 7, 1955, c. 283, § 3, 69 Stat. 283.

tion 4) and criminal (Section 3) actions by the Justice Department, and treble damage suits by private parties (Section 7). 15 U. S. C. Sections 3, 4, 15 (1958); but cf. Federal Trade Commission *v.* Cement Institute, 333 U. S. 683 (1948). Under the Clayton Act,[6] private actions may be in the form of suits for injunctive relief (Section 16) or for treble damages (Section 4). 15 U. S. C. Sections 26, 15 (1958); public actions, in the form of suits principally by the FTC and the Justice Department under Section 11 for violations of Sections 2, 3, 7 and 8 of that act. 15 U. S. C. 21 (1958).

To be distinguished is the role of the FTC under the FTC Act.

The Federal Trade Commission was established under the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717) and invested with both adjudicatory and investigatory functions. Under Section 5 (of the FTC Act) the FTC was empowered to order the discontinuance of "unfair methods of competition" and later "unfair * * * practices" which were declared "unlawful" by the Act. See the extensive legislative history in Judge Denison's partial dissent in L. B. Silver Co. *v.* Federal Trade Commission, 289 Fed. 985, 992-998 (6 Cir. 1923); Federal Trade Commission *v.* Klesner, 280

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[6] The Sherman Act applied solely to consummated contracts and conspiracies. Standard Oil Co. *v.* United States, 221 U. S. 1, 58 (1911); Standard Fashion Co. *v.* Magrane-Houston Co., 258 U. S. 346, 355 (1922). In 1914, Congress enacted the Clayton Act which sought to reach certain specific practices, considered dangerous to free competition in commerce and trade, but not covered by the Sherman Act. Act of October 15, 1914, c. 323, 38 Stat. 730. Standard Fashion Company *v.* Magrane-Houston Co., 258 U. S. 346, 356 (1922); Corn Products Refining Co. *v.* Federal Trade Commission, 324 U. S. 726, 738 (1945). It was thought that by making these practices illegal, the creation of trusts, conspiracies and monopolies would be arrested in their inception. See United States *v.* United Shoe Machinery Co., 264 Fed. 138, 162 (E. D. Mo. 1920), quoting the report of the Senate Committee.

U. S. 19 (1929); Federal Trade Commission *v.* Raladam Co., 283 U. S. 643, 647 (1931). Purposefully left broad and generally undefined (as to what constituted an "unfair method of competition" or an "unfair practice"), Section 5 proceeded on the idea of an administrative body of experts (the FTC) which, given a flexible standard of judgment, would discover and prevent the use of such practice before it worked a Sherman violation. See Federal Trade Commission *v.* Motion Picture Advertising Service Co., 344 U. S. 392, 394 (1953); Federal Trade Commission *v.* Raladam Co., 283 U. S. 643, 648 (1931); see Beer, Federal Trade Law and Practice (1942) P. 76-77. The Sherman Act was to serve as a guide for the Commission, as a "declaration of policy", to be considered in determining what constituted an unfair method of competition. Federal Trade Commission *v.* Beech Nut Packing Co., 257 U. S. 441 (1922); Standard Oil Co. *v.* Federal Trade Commission, 282 Fed. 81, 86-87 (3 Cir. 1922) affirmed 261 U. S. 463 (1923).

Within this area of "unfair methods of competition", the FTC Act and the Clayton Act overlap. At the time of the enactment of the Clayton Act, it was believed that its specific prohibitions particularly Section 2 and Section 3 (15 U. S. C. Sections 13, 14 (1958)) would be covered by Section 5 of the FTC Act. However, Congress, by declaring these practices unlawful specifically in the Clayton Act, took away from the Commission its informed judgment respecting them.[7] These "unfair methods of com-

[7] From the House version of the Clayton bill (H. R. 15657) the Senate Committee had stricken what eventually became Sections 2 and 3 of the Act because it felt that these "unfair methods of competition" would be covered by Section 5 of the FTC Act. A long debate ensued in the Senate. See 13963, 14088-14100; 14200-14229; 14249-14276 (1914). Finally the Senate voted to restore them to the Clayton bill, mainly for the reasons stated by Senator Clapp: to declare these practices unlawful specifically and withdraw them from the judgment of the commission. 51 Cong. Rec. 14257 (1914).

petition (later amended to include "unfair * * * practices"), whether prohibited specifically under the Clayton Act, or generally under the FTC Act, were to be restrained according to a congressional design. While Section 5 of the FTC Act was to be enforced by the FTC, Section 11 of the Clayton Act provided a scheme of dual enforcement of Sections 2, 3, 7 and 8 of that act, by the FTC and the Justice Department; and while the underlying substantive violation of Section 5 (FTC Act) did not give rise to a private right of action (the FTC Act was not an antitrust law within the meaning of Clayton Section 4), a violation of Sections 2, 3, 7 and 8 did, no matter by which agency, if either of them, they were enforced. In short, the FTC Act bolstered the Clayton and Sherman Acts both by restraining evils, which might also constitute violations of those acts, and by reaching areas not covered by their proscriptions. These three acts are "interlaced" remedially as well as substantively evincing a Congressional desire for a "cumulative remedy" for the threats and dangers to trade and competition. See Federal Trade Commission *v.* Cement Institute, 333 U. S. 683, 694-695 (1948); United States *v.* Borden Company, 347 U. S. 514, 518 (1954). 51 Cong. Rec. 16274-16275 (1914). The question here presented concerns in part the "cumulative remedy" Congress provided for the violation of Section 7 of the Clayton Act. In the case at bar, both the FTC (under Section 11) and N. J. Wood (under Section 4) had brought actions based on the violation of Section 7. N. J. Wood claims that, by virtue of the FTC proceeding, it is entitled to the benefits of Section 5 of the Clayton Act. Section 5 is auxiliary to Section 4 and provides for the tolling of the statute of limitations in favor of potential private suitors during the pendency of certain government antitrust units. 3M, however, contends that the FTC proceeding is not a proceeding instituted by the United States within the meaning of Section 5.

As we indicated above, specifically granted in Section 11 of the Clayton Act, (15 U. S. C. 21 (1958)), was the jurisdiction of the FTC to enforce compliance with Sections 2, 3, 7 and 8 of the Act, (15 U. S. C. 13, 14, 18, 19 (1958)) to be shared concurrently with the Justice Department. (See footnote 12 infra). United States *v.* W. T. Grant Co., 345 U. S. 629, 632 (1953); Standard Oil Co. *v.* United States, 337 U. S. 293, 310 (Note 13) (1949); United States Alkali Export Association, Inc. *v.* United States, 325 U. S. 196 (1945). In the latter opinion, at P. 206-209 Chief Justice Stone described the enforcement of these provisions as one of "efficient cooperation" between the "two agencies". This relationship was further cemented in 1950 when Congress amended Section 11, giving the Attorney General the right to intervene in an FTC Clayton Act proceeding. Act of December 29, 1959, c. 1184, 64 Stat. 1125; House Report No. 1191, August 4, 1949, 81 Cong., 1st Session; S. Report No. 1775 June 2, 1950 81st Cong. 2d Session. See also Final Report of Attorney General's National Committee to study Antitrust Laws, G. P. O. March 1955, at P. 375, et seq. We believe that when Congress vested authority in the FTC to enforce the Clayton Act provisions, it designated the FTC as a "representative of the United States" having "authority to represent its interest in a final adjudication" of an alleged Clayton antitrust violation. Sunshine Coal Co. *v.* Atkins, 310 U. S. 381 (1940); United States *v.* Willard Tablet Co., 141 F. 2d 141 (7 Cir. 1944); United States *v.* R. C. A., 358 U. S. 334 (1959). In the latter case, the Supreme Court held that because the Federal Communications Commission (FCC) had not the power and authority to decide the antitrust issue there presented, the United States would not be estopped by any determination made therein. Underwritten in that decision is the thought that if the FCC had the power and authority to decide those antitrust issues, FCC would have been regarded in that instance

as a representative of the United States.[8] R. C. A. case, supra, P. 352. This clearly negates the proposition offered by 3M in this appeal, that suits by the United States and proceedings by the FTC must be regarded as distinct, because "agency determinations do not bar antitrust suits". The cases cited by 3M[9] deal fundamentally with questions of primary jurisdiction over matters having antitrust implications. They hold merely that agency determinations in proceedings brought in regulation of other laws (e.g., Interstate Commerce Act, Natural Gas Act) without authority to adjudicate antitrust issues will not bar antitrust suits by the United States. Cf. Pan American Airways *v.* United States, 371 U. S. 296 (1963). In the FTC proceeding at issue, where the Commission under Section 11 was directly given such authority to enforce the Clayton Act, such action must be regarded as one on behalf of the United States, the interests of which are now further protected by Attorney General's right of intervention.

Any argument that an FTC proceeding is not a suit by the United States must meet the reality that whether the Commission functions under the Clayton or the FTC Act, it does so in the public interest and as an administrative arm of the Government. See 16 C. F. R. Section 1.21 Rules of Practice of the Federal Trade Commission; Federal Trade Commission *v.* Cement Institute, 333 U. S. 683, 692-693 (1948); Federal Trade Commission *v.* Gratz, 253 U. S. 421, 432, 435 (1920), Justice Brandeis dissenting but not as to the functioning of the Commission; certainly an

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[8] We do not consider that Section 11(c) of the Clayton Act or the case of United States *v.* W. T. Grant, 345 U. S. 629, 632 (1953) compels the conclusion that both the FTC and the Justice Department can bring separate proceedings against a single defendant for the same alleged violation under Section 11. Rather Section 11(c) would seem to indicate that a suit by the FTC under Section 11 should not work to relieve a defendant from a private antitrust suit. 15 U. S. C. 21(c) (1958). See 51 Cong. Rec. 16274 (1914).

[9] Georgia *v.* Pennsylvania R. Co., 324 U. S. 439 (1959); United States *v.* Borden Co., 308 U. S. 188 (1939); California *v.* Federal Power Commission, 369 U. S. 482 (1962).

FTC proceeding under Section 11 of the Clayton Act should not be rendered an anomaly in the Congressional plan for "antitrust law" enforcement. This plan definitely contemplates private and public actions, with some of these public actions, being brought by the FTC under Section 11. As Judge Augelli succinctly phrased it below:

> "It certainly would seem not to have been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstances of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical." New Jersey Wood Finishing Co. *v.* Minnesota Mining and Manufacturing Co., 216 F. Supp. 507, 510 (D. C. N. J. 1963).

The sole reason for Section 5 of the Clayton Act was to stimulate private antitrust suits (see footnote 4) and aid such private suitors. As it appears that the FTC is the primary enforcing agency of Section 7 of the Clayton Act (see United States *v.* Philadelphia National Bank, 374 U. S. 321 (1963)),[10] to hold that such a proceeding was

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[10] Opinion by Mr. Justice Brennan at P. 346:

"The legislative history shows that the objective of including the phrase 'corporation subject to the jurisdiction of the Federal Trade Commission' in Section 7 was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hearings, debates, and committee reports was upon the powers of the FTC * * * Furthermore, although the Clayton Act has always provided for dual enforcement by court and agency (cites), prior to the 1950 amendment, enforcement of Section 7 was left largely to the FTC. Martin, Mergers and the Clayton Act (1959) 205, 219; Montague, The Cellar Anti-Merger Act; An Administrative Problem in an Economic Crisis, 37 A. B. A. J. 253 (1951). And the impetus to amend Section 7 came in large part from the FTC (cites). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction." See also Mr. Justice Harlan's dissent at p. 392, supra.

not within Section 5(b) would thwart in part the Congressional scheme for the enforcement of Section 7. We think it must follow that a Section 4 private right is preserved by a Government action to enforce Section 7, whether that action is brought by the Justice Department or the FTC; that it is not a question whether it is a judicial or an administrative proceeding but rather whether it is a proceeding on behalf of the United States to enforce the "antitrust laws".

It is also asserted that an action by the FTC is not a "proceeding in equity", as Section 5 originally provided.[11] Certainly, when the Justice Department seeks an injunction against a defendant for violation of the Clayton Act, its purpose is to prevent irreparable injury to the public weal by the traditional equitable remedy. Section 15 of the Clayton Act, 15 U. S. C. 25 (1958); United States *v.* Borden Co., 347 U. S. 514, 518 (1954). The effect of the FTC proceeding is essentially the same, by virtue of the 1959 amendment to Section 11, hereinafter referred to as the Finality Act of 1959.[12] Act of July 23, 1959, Pub-L

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[11] See footnote 2. Section 5 now reads "civil * * * proceeding" instead of "suit or proceeding in equity".

[12] Section 11 provides:

"(a) That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: * * * in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"(b) Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person [and the Attorney General (amended Dec. 29, 1950, c. 1184, 64 Stat. 1125] a complaint stating its charges in that respect, and containing a notice of a hearing * * *. The person so complained of shall have the right to appear * * * and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. [The Attorney

(Footnote continued on next page)

86-107, Section 1, 73 Stat. 243. Formerly the FTC had to seek the enforcement of its order—after its determination of a Clayton Act violation, and a subsequent violation of the order (See Federal Trade Commission *v.* Ruberoid Co., 343 U. S. 470 (1952))—by a petition to the Court of Appeals; but now enforcement decrees by the Circuit Court of Appeals are unnecessary and the orders become final and self-executing by the expiration of defendant's time to seek review.

General shall have the right to intervene and appear in said proceeding (amended, 64 Stat. 1125)]. * * * If upon such hearing, the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * *.

"(c) (as amended by the Finalty Act of 1959, 73 Stat. 243). Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the Court of Appeals of the United States * * * by filing with the court * * * a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court * * * shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, * * * To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. * * * The judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari * * *.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify or set aside orders of the commission or board shall be exclusive.

"(e) * * * No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

"(f) * * *

"(g) Any order issued under subsection (b) shall become final—

(Footnote continued on next page)

Opinion of the Court of Appeals Below

The legislative history of the FTC Act and the Clayton Act, indicates that the FTC cease and desist order originally was to be more in the nature of "notice" of violation than an injunctive measure. The bare order had "no effect in itself, unless made operative by the Circuit Court of Appeals, * * *." Proper *v.* John Bene and Sons, Inc., 295 Fed. 729, 731 (E. D. N. Y. 1923). The FTC functioned as an investigatory body which would judge and note violations of the Acts. In formulating its findings and order, it presented itself in a manner analogous to a Master in Equity to the Court of Appeals [See address of William H. Taft, of October 20, 1914, reported in New York Times, October 21, 1914, P. 5] which sat not as an Appellate Court but as a court of equity enforcing, modifying or setting aside the orders of the FTC. C. E. Niehoff & Co. *v.* Federal Trade Commission, 241 F. 2d 37, 42 (7 Cir. 1957); Federal Trade Commission *v.* Fairyfoot Products Co., 94 F. 2d 844 (7 Cir. 1938); Butterick *v.* Federal Trade Commission, 4 F. 2d 910 (2 Cir. 1925); L. B. Silver *v.* Federal Trade Commission, 292 Fed. 752, 753 (6 Cir. 1923). See e.g. 51 Cong. Rec. 14927, 14768-70, 14251-52, 16281 (1914), H. Rep. No. 1142, 63 Cong. 2d Sess. p. 19;

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(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

(2) * * *

(3) * * *

(4) * * *

"(h) * * *

"(i) * * *

"(j) * * *

"(k) * * *

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation which shall accrue to the United States and may be recovered in a civil action brought by the United States. * * *"

Henderson, Federal Trade Commission (1924) pp. 77-78. In addition to examining the prospective application of the order, restraining the violation of the Act, the Court of Appeals had to determine the legality of the order, whether the facts properly found by the FTC constituted a violation of the Act. See Federal Trade Commission *v.* Broch and Co., 368 U. S. 360, 364 (1962); Federal Trade Commission *v.* Ruberoid Co., 343 U. S. 470, 473-474 (1952); Jacob Siegel Co. *v.* Federal Trade Commission, 327 U. S. 608, 612 (1946); Federal Trade Commission *v.* Fairyfoot Products Co., 94 F. 2d 844 (7 Cir. 1938); See Beer, supra p. 420. By virtue of the Finality Act, if judicial review is not sought, the cease and desist order becomes final, and an adjudication that a violation of the Clayton Act has been committed. That act brought to Clayton Act-FTC orders the same binding effect that had been given FTC orders under the FTC Act. See Federal Trade Commission *v.* Morton Salt Co., 334 U. S. 37, 54 (1948); United States *v.* Willard Tablet Co., 141 F. 2d 141, 143 (7 Cir. 1944); George H. Lee Co. *v.* Federal Trade Commission, 113 F. 2d 583 (8 Cir. 1940); United States *v. Piuma*, 40 F. Supp. 119 (S. D. Calif. 1941); affirmed 126 F. 2d 601 (9 Cir. 1942); See 152 ALR Anno. 1198 (1944).

The "proceeding in equity" therefore was not the Commission proceeding but the proceeding before the Court of Appeals from which a judgment or decree would issue determining and restraining a violation of the Act. With development of "final orders" in FTC proceedings, whether the order becomes final by expiration of time in which to seek review or by a judgment or decree from a Court of Appeals, the proceeding resulting in such final order or decree, is a "proceeding in equity" and a "civil proceeding" within the meaning of Section 5, and an adjudication of a violation of the Clayton Act.

The vital effect of these changes is overlooked by appellant in its strong reliance upon the 1923 decision in Prope[illegible]. John Bene and Sons, Inc., 295 Fed. 729 (E. D.

N. Y. 1923). That opinion held that a FTC proceeding under the FTC Act is not a "proceeding in equity • • • instituted by the United States" to restrain violations of the "antitrust laws" within Section 5 of Clayton Act. In Proper, the plaintiff brought a private antitrust suit for treble damages for violations of the Clayton, Sherman and FTC Acts. A proceeding had been brought against the defendant by the FTC under the FTC Act and the plaintiff sought to have the bare FTC order, unenforced by the courts, admitted as prima facie evidence under Section 5.

The court denied it for several reasons: that the proceeding before the Commission was not a "proceeding in equity"; that the FTC order was not a "final judgment or decree"; that the proceeding by the FTC to enforce Section 5 of the FTC Act was not a suit under the antitrust laws as that term is used in Section 5 of the Clayton Act. There are no findings in Proper contrary to our conception of the law as it stood in 1923. The Court in Proper dealt with a 1923 FTC proceeding under the FTC Act. We have before us a proceeding under the Clayton Act brought by an expanded 1960 FTC.

With that thoroughly in mind, the 1945 decision of Brunswick-Balke Collender Co. *v.* American Bowling and Billiard Corp., 150 F. 2d 69 (2 Cir. 1945) cited by Judge Augelli below, becomes far more reflective of the problem presented by this appeal. There the Court held that an FTC proceeding brought for violations of Section 3 of the Clayton Act was a "final judgment or decree" rendered in a "suit or proceeding in equity brought by or on behalf of the United States" within Section 5 of the Act. In so deciding, the Court had mistaken the scope of the Act of March 21, 1938, c. 49, 52 Stat. 111. 15 U. S. C. 45 (1958). That statute did not amend Section 11 of the Clayton Act but only Section 5 of the FTC Act, and on rehearing the Court reversed itself, concluding that because the order was not "final", it was inadmissible as prima facie evidence under Clayton Section 5, citing Proper *v.* John

Bene & Sons, Inc., supra. It is obvious that if the order had been final, as it is today, (by virtue of the Finality Act), the Court would have regarded the "final order" admissible under Section 5. See Fifth and Walnut *v.* Loew's, Inc., 176 F. 2d 589, 593 (footnote 9) (2 Cir. 1949).

3M has argued that Section 5(b) (the tolling provision) is dependent upon Section 5(a) (the prima facie evidence provision), and that the two subsections must be construed as a unit. One theory advanced is that the express statement in Section 5(a): That this section shall not apply to "consent judgments or decrees" should be brought down to Section 5(b) and interpreted so as to prevent the tolling of the statute of limitations where the civil or criminal proceeding is terminated by a consent order. Apart from the legislative history which negates such construction 51 Cong. Rec. 15825-15826; 16046-47; 16276 (1914), it would seem that if the proviso were to apply to both paragraphs, there would be no reason to insert it after the first. As the district court further pointed out: "The proviso is grammatically a part of the single sentence which comprises Section 5(a), separated only by a colon." See Flora *v.* United States, 362 U. S. 154, 150 (1960). More important is the substantive application of the consent judgment proviso. While the proviso deals with the termination of the government suit, the tolling provision operates during its "pendency". Section 5(a) permits the use of government judgments and decrees as prima facie evidence, only as to matters actually decided in the government suit. Emich Motors Corp. *v.* General Motors, 340 U. S. 558 (1951). 5(b) tolls the statute of limitations as to "matters complained of" whether or not they are actually decided. Union Carbide and Carbon Corp. *v.* Nisley, 300 F. 2d 561 (10 Cir. 1962). To construe this section as appellant desires, would be to force every private antitrust claimant caught between the running of the statute and the possible consent termination of the government proceeding, to start suit without the benefits of the government action. See Twin Ports Oil Co. *v.* Pure

Oil Co., 26 F. Supp. 366, 372-376 (D. C. Minn. 1939), affirmed on other grounds, 119 F. 2d 747 (8 Cir. 1941); Twentieth Century-Fox Film Corp. *v.* Brookside Theatre Corp., 194 F. 2d 846 (8 Cir. 1952).

The defendant 3M also suggests that proceedings which cannot yield judgments and decrees applicable as prima facie evidence under Section 5(a) cannot toll the statute of limitations under Section 5(b). The legislative history is sparse on the interrelationship between the two sections. The only clear Congressional commentary on this point occurred in the debates on the House Clayton bill, (51 Cong. Rec. 9165, 9488-90 (1914)), which had no provision for the enforcement of its sections by the FTC; [See H. Rep. No. 627, 63 Cong. 2d Sess. (1914)]; so that the question whether FTC proceedings to enforce the Clayton provisions tolled the statute of limitations was not squarely met by the 1914 legislators. The House debates support 3M's view solely to the extent that the tolling provision was to enable the private claimant to reap the benefits of the government action, i.e., the use of a government judgment and decree as prima facie evidence. Union Carbide & Carbon Corp. *v.* Nisely, 300 F. 2d 561 (10 Cir. 1962). But see 51 Cong. Rec. 16003 (1914). In addition to the decisions noted infra (see footnote 14, infra), other courts have regarded the two subsections as related and dependent. See Sun Theatre *v.* R. K. O. Radio Pictures, 213 F. 2d 284, 289-293 (7 Cir. 1951); Momand *v.* Universal Film Exchange, 43 F. Supp. 996, 1012 (D. C. Mass. 1942), affirmed 172 F. 2d 37 (1 Cir. 1948). However, we see no reason why final FTC orders enforcing the Clayton Act should not be admitted as prima facie evidence under Section 5(a). Brunswick-Balke Collender Co. *v.* American Bowling and Billiard Corp., 150 F. 2d 69 (2 Cir. 1945). But cf. United States *v.* United Shoe Machinery Corp., 89 F. Supp. 349, 356 (D. C. Mass. 1950). (Final disposition of case 110 F. Supp. 294 (D. C. Mass. 1953), affirmed per curiam 346 U. S. 894 (1953)). While our 1914 legislators would not have accepted a bare

FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have resulted in its being considered a "final judgment or decree", within Section 5(a). Today of course, under the Finality Act, the orders of the FTC become final adjudications of antitrust violations by expiration of the time in which review can be sought.

The operation of Section 5(a) has been explained to some extent by Emich Motors Corp. *v.* General Motors, 340 U. S. 558 (1951). Judgments and decrees in government suits are only prima facie evidence of antitrust violations. The defendant still has his "day in Court" on that issue. See Harrison *v.* Paramount Pictures, 115 F. Supp. 312 (E. D. Pa. 1953), affirmed 211 F. 2d 405 (3 Cir. 1954). He is entitled to offer rebuttal evidence to break down the force and effect of that prima facie evidence. 51 Cong. Rec. 13856-13858 (1914); see the authorities collected in Richfield Oil Corp. *v.* Karseal Corp., 271 F. 2d 709, 716-727 (9 Cir. 1959). See also 65 Harv. L. Rev. 1400 (1952). 3M argues that FTC orders cannot be admitted because of the more liberal evidentiary rules of the administrative agency. This plus the broader administrative process might place the FTC proceeding on a somewhat unequal footing with a similar judicial proceeding brought by the Department of Justice. See United States *v.* Morton Salt Co., 338 U. S. 632, 641-643 (1950); Hunt Foods & Industries, Inc. *v.* Federal Trade Commission, 286 F. 2d 803 (9 Cir. 1961). But see United States *v.* Household Goods Movers Investigation, 184 F. Supp. 689 (D. C. D. C. 1960). The differences are at most peripheral and any attack along those lines would go to the weight of the prima facie evidence, not to its propriety. The use of administrative orders as prima facie evidence in private suits is not new to our law. Under the Interstate Commerce Act, 49 U. S. C. Section 16 (13) (1958) a reparation order of the ICC is admissible as prima facie evidence in an action for damages by a shipper against a defendant railroad, found

by the ICC to have exacted unreasonable rates.[13] Meeker & Co., *v.* Lehigh Valley R. R., 236 U. S. 412, 430 (1915); Pennsylvania R. Co. *v.* Weber, 257 U. S. 85 (1921); Western Maryland Ry. *v.* Penn Veneer Co., 92 F. 2d 146 (3 Cir. 1937). While we are satisfied that final orders in FTC Clayton Act proceedings are admissible under Section 5(a) as prima facie evidence, in the case at bar, N. J. Wood will not get the benefit of Section 5(a) because the FTC proceeding involved ended in a consent order, apparently before any testimony was taken. We have reached this question solely because there was some evidence in the

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[13] When the FTC bill reported out of the Senate Committee June 13, 1914 [S. Rep. No. 597, 63 Cong. 2d Sess. 1914)], it reflected a desire for a Commission with the same "effective powers and usefulness as had been given the ICC." 51 Cong. Rec. 10376 (1914). The floor debates in the Senate reveal a recurring Congressional feeling for an FTC functioning like the ICC. Distinctions and similarities were consistently noted. Representative Covington said:

> "There is, however, a perfect analogy between the former power of the Interstate Commerce Commission under the Cullom Act and the power of the Federal Trade Commission. Under the Cullom Act, the Interstate Commerce Commission had the power to determine whether an existing rate was unreasonable, and, if it is so found, to order the railroad to cease and desist from charging that rate.
>
> "The Federal Trade Commission will have precisely similar power in regard to an existing method of competition. It is instructive therefore to bear in mind that the orders of the Commission under that act were not final but were subject to review by the courts." 51 Cong. Rec. 14932 (1914).

Also, in the Senate report in the Clayton Bill (S. Rep. No. 698, 63 Cong. 2d Sess. 1914), the Committee recommended the change in Section 5(a) from "conclusive evidence" to "prima facie evidence". At P. 45, it drew the analogy of the use of a tax deed as evidence of title, citing Cooley in Taxation, 521 5th Ed. 1886, and Marx *v.* Hanthorn, 148 U. S. 172, 183 (1893). These same thoughts are expressed in the ICC-Meeker case, supra, which cites Marx *v.* Hanthorn. Such Congressional thinking tends to show that the 1914 legislator would not be adverse to the use of affirmed FTC orders as prima facie evidence.

legislative history of the section that the two subsections are to be construed together, as other courts have subsequently held. However, the decision of the court below that the two subsections should not be regarded as *inter* dependent does have substantial support.

The above mentioned intention in 1914 does not seem as plain in 1955 when Congress amended Section 5 and divided Section 5 into subsections (a) and (b). Act of July 7, 1955, c. 283, Section 2, 69 Stat. 283. The committee reports on the 1955 amendment to Section 5, plainly intimated a broader reason for tolling the statute of limitations. By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor. See Theatre Enterprises, Inc. *v.* Paramount Film Distributing Corp., 346 U. S. 537 (1954); Partmar Corp. *v.* Paramount Pictures Theatres Corp., 347 U. S. 89, 102-103 (1954). The real importance of government proceedings that accrues today to private suitors is the availability to them of the government's case against the defendant. Section 5(b) enables "a plaintiff to take advantage of facts uncovered" as a result of the government proceedings. New Jersey Wood Finishing Co. *v.* Minnesota Mining & Manufacturing Co., 216 F. Supp. 507 at P. 510 (D. C. N. J. 1963). In the Senate Report on the 1955 amendment to Section 5 (b) the Committee wrote:

> "Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint". Senate Report No. 619, June 21, 1955, U. S. Code Cong. & Ad. News, 84 Cong. 1st Sess. P. 2332.

Whether or not this shift in congressional intent was there fully outlined, it seems to us that FTC orders and

FTC proceedings presently enjoy the efficacy of court proceedings for purposes of Section 5, and that in this appeal the FTC proceeding against 3M to restrain a violation of Clayton Section 7, tolled the statute of limitations and that N. J. Wood's complaint was timely.

Three recent decisions[14] on the issue before us all relied on the old Proper case, supra, and summarily rejected the Brunswick Balke-Collender opinion. In so doing, those courts clearly overlooked the affirmative statutory distinction between FTC proceedings under the FTC Act and under the Clayton Act and that distinction's vital effect upon Section 4 and Section 5 of the Clayton Act; otherwise they could not have reasonably adopted the obsolete Proper rule. To do so at this stage is to consider the present question in a vacuum and simply forget all about the present governing statutory formula for the enforcement of the Clayton Act and the increased powers that have come to the FTC.

It is also clear that the status of the Brunswick-Balke opinion of Judge Frank was fundamentally misunderstood. The sound legal principle there pronounced that final FTC orders in Clayton Act proceedings are admissible within Section 5(a), was not reversed. It was simply not usable because, as was discovered, there was no Finalty Act at the time, dealing with FTC-Clayton Act orders. When Congress passed the Finalty Act in 1959, it simply vitalized the principle of Brunswick-Balke as to Section 5(a). We are satisfied that this principle is good law and good common sense and that its logical extension is applicable to the Section 5(b) question here involved.

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[14] Highland Supply Corporation *v.* Reynolds Metals Company, 221 F. Supp. 15 (E. D. Mo. 1963), reversed in part (but affirmed on the issue at bar) 327 F. 2d 725 (8 Cir. 1964); Volasco Products Co. *v.* Lloyd A. Fry Roofing Company, 223 F. Supp. 712 (E. D. Tenn. 1963); Farmington Dowel Products Co. *v.* Forster Mfg. Co., Inc., 223 F. Supp. 967 (D. C. Me. 1963)

Finally, 3M claims that even if the FTC proceeding tolled the statute of limitations, it preserved only the Clayton counts and the Sherman counts are barred. The statutory language of Section 5(b) tolls the statute as to "any matter complained of" in the Government suit. One of the overt acts upon which N. J. Wood's conspiracy count was based was the acquisition of IWI by 3M.[13] While "contract of conspiracy" was not at issue before the FTC, the acquisition of IWI was. N. J. Wood's complaint alleges that this act of acquisition was in furtherance of a conspiracy to restrain competition and to monopolize trade. There was a "substantial identity of subject matter." Union Carbide and Carbon Corporation *v.* Nisley, 300 F. 2d 561, 570 (10 Cir. 1962). We, therefore hold that the acquisition of IWI was a "matter complained of" within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts. Union Carbide, supra; Steiner *v.* 20th Century-Fox Film Corporation, 232 F. 2d 190, 196 (9 Cir. 1956).

The judgment of the District Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[13] Defendant Essex Wire is not before us on appeal, but it appears from the record that the trial judge below dismissed it with prejudice only as to the Clayton counts and not as to the Sherman counts. Though we do not decide the question, it would appear that the statute of limitations is tolled only as to named defendants in the Government suit. Sun Theatre Corp. *v.* R. K. O. Radio Pictures, 213 F. 2d 284 (7 Cir. 1954); Momand *v.* Universal Film Exchanges, 172 F. 2d 37 (1 Cir. 1948).